

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

SUSAN E. BREDTHAUER, et al.,

Plaintiffs,

v.

GILBERT G. LUNDSTROM, et al.,

Defendants.

and

RONALD A. LAIRD, et al.,

Plaintiffs,

v.

GILBERT G. LUNDSTROM, et al.

Defendants.

and

SUSAN BARKER,

Plaintiff,

v.

SAMUEL P. BAIRD, et al.

Defendants.

Case No. 4:10-cv-3132

Case No. 4:10-cv-3139

Case No. 8:10-cv-326

**BRIEF IN SUPPORT OF
MOTION TO DISMISS OF GALE FURNAS**

I. INTRODUCTION

Under Fed. R. Civ. P. 4(l)(1), proof of service must be made to the court unless service is waived. Under NeCivR 5.4 a certificate of service must be filed with the Court. Defendant Gale Furnas ("Furnas") did not waive service, and no proof of service was filed with the Court.¹ Accordingly, for the additional reasons stated herein, the present action should be dismissed as against Furnas.²

II. STANDARD OF REVIEW

Under Rule 4 of the Federal Rules of Civil Procedure, the purpose of service of process is to make sure that the defendant receives notice of the commencement of an action against him. See *Hanna v. Plumer*, 380 U.S. 460, 462 at n.1 (1965). "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolph Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). Under Rules 12(b)(4) and 12(b)(5), a "defendant may object to plaintiff's failure to comply with the procedural requirements for proper service set forth in or incorporated by Rule 4." *Richardson v. Alliance Tire & Rubber Co.*, 158 F.R.D. 475, 477 (D. Kan. 1994) (quoting 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1353 (2d ed. 1990)).³

A defendant may move to dismiss the complaint under Rule 12(b)(5) if the plaintiff does not properly effect service. *Hiska v. Jones*, 217 F.R.D. 16, 20 (D.D.C. 2003). When considering a motion to dismiss for insufficient service of process under

¹ A court may take judicial notice of judicial opinions and public records without converting a motion made under Rule 12 into a motion for summary judgment. See *Stutzka v. McCarville*, 420 F.3d 757, 761, n. 2 (8th Cir. 2005); *Henson v. CSC Credit Serv's.*, 29 F.3d 280, 284 (7th Cir. 1994) (citations omitted)

² Furnas has joined in a concurrently filed omnibus motion to dismiss all claims against all defendants, and this motion simply provides an independent grounds for dismissing Furnas from the action.

³ Courts recognize that the mere filing of a notice of appearance by a party's attorney does not waive service of process objections. See e.g. *Grajczyk v. Tasca*, 717 N.W.2d 624 (S.D. 2006) (citing *Public Gas Co. v. Weatherhead Co.*, 409 So.2d 1026, 1027 (Fla. 1982)).

Federal Rule of Civil Procedure 12(b)(5), the plaintiff bears the burden of persuading the Court that service of process was validly made. *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993). The court may dismiss the action for failure to properly serve the defendant when the plaintiff does not meet this burden. See *Lasky v. Lansford*, 76 Fed.Appx. 240, 240-41 (10th Cir. 2003) (unpublished).

III. ARGUMENT

Under Fed. R. Civ. P. 4(m), "if a defendant is not served within 120 days after the complaint is filed dismissal is proper." Three class actions have been filed with the Court: (1) *Bredthauer, et al. v. Lundstrom, et al.*, Case No. 4:10-cv-3132; (2) *Laird, et al. v. Lundstrom, et al.*, Case No. 4:10-cv-3139; and *Barker v. Baird et al.*, Case No. 8:10-cv-326. Mr. Furnas was named as a defendant in *Bredthauer*, but he was not named as a defendant in the other two class actions. Recently, these class actions were consolidated, and a consolidated class action complaint was filed on October 1, 2010. (Case No. 4:10-cv-3132, Doc. No. 57). As the record shows, Mr. Furnas was not properly served within the time period required by Fed. R. Civ. P. 4(m) in *Bredthauer* nor was he properly served in the consolidated class action. Therefore, dismissal of the action is proper under Fed. R. Civ. P. 4(m).

The complaint in *Bredthauer* was filed July 7, 2010. (Doc. No. 1). A summons for Mr. Furnas was issued on July 12, 2010. (Doc. No. 7). On July 22, 2010, summons were executed on fourteen (14) of the defendants (Doc. Nos. 13-26), but no summons was executed on Mr. Furnas. As the record in this case clearly shows, Mr. Furnas was not served within 120 days after the *Bredthauer* complaint was filed on July 7, 2010.

IV. CONCLUSION

Defendant Gale Furnas respectfully requests that this Court enter an Order dismissing him from the above-captioned proceeding and for such other, further, and different relief as this Court deems just and equitable.

DATED this 15th day of November, 2010

GALE FURNAS, Defendant.

By: *s/David A. Yudelson*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of November 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which sent notification of such filing to all CM/ECF participants.

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